MISCELLANY.

The Lawyer.—The lawyer is in the forefront of publicity, the most advertised man in the community. He is in a natural position of leadership. The men who rely on his legal judgment are impressed by his political views. Truly, the lawyer who refuses to enter politics is sidestepping a moral obligation.

Kansas Law—A rather pointed illustration of the modern tendency to legislate everything under the sun, was given by a speaker at the recent national convention of retail jewelers. He said, on this subject: "Kansas is a prohibition state, yet has a law prohibiting the eating of snakes—and there they are supposed to drink only water. I know a man who invited a friend to Kansas City, and when he got him there bet him $100 he couldn't go six hours without breaking a law. The stranger took him on and then went to sleep, confident of winning the $100. His host waited until his nap was over and had him pinched for sleeping under a sheet less than nine feet long. Too many laws, I say."—Ex.

The Reason.—An editor smarting under the immunity of lawyers from slander suits gets even by throwing off the following:

"A lawyer in a court room may call a man a liar, a scoundrel, villain, or thief, and no one makes complaint when court adjourns. If a newspaper prints such a reflection on a man's character, there is a libel suit or a dead editor. This is owing to the fact that people believe what an editor says."

The reason may be that the press has a thousand tongues; a lawyer but one.—Ex.

Holding Your Temper Wins Your Cause.—It was a wise old southern deacon who advised with a chuckle: "Keep yo' tempah, son. Doan' yo' quarrel with no angry pusson. A soft answah's alus best. Hit's commanded an' furdermo,' hit makes 'em maddah'n anything else yo' could say."—Ex.

"Passing the Buck"—Codefendants Proving Each Other Negligent—In Carlton *v.* Boudar, 118 Va. 521, 531, 88 S. E. 174, the plaintiff, Boudar, while a passenger in a taxicab of the Richmond Transfer Company, was injured by a collision with defendant Carlton's automobile. He sued them jointly and obtained a verdict for $3,000 against both defendants. In affirming the judgment, the Supreme Court said:

"Upon the motion to set aside the verdict as contrary to the evidence, there is testimony strongly tending to prove negligence on

the part of both chauffeurs. The plaintiff in the court below, indeed, seems to have had an easy task. The Richmond Transfer Company established the guilt of Carlton's chauffeur, and Carlton, on the other hand, if his witnesses are to be believed, overwhelmed the Transfer Company with proof of its derelictions."

A High Authority.—In Nimmo *v.* O'Keefe (Tex. Civ. App.), 204 S. W. 883, 885, the court said: "Appellee cites as authority under this assignment the words of our Saviour found in Matthew 20:15, to wit: "Is it not lawful for me to do what I will with my own?" Doubtless no higher authority could be invoked, and it might not be inappropriate for us to conclude that the legal profession, including counsel for appellant, would accept the announcement made by the Son of Man as decisive of the question here involved."

The Virginia-West Virginia Debt Controversy.—The Supreme Court has left open a point of exceptional interest in holding over for reargument the rule requiring West Virginia to show cause why in default of payment of the judgment in favor of Virginia an order should not be entered directing the levy of a tax by the legislature, and a motion by West Virginia to dismiss the rule.[1] The decision by the chief justice points out that Congress as required by the Constitution ratified the agreement by which West Virginia assumed its proportional share of the debt of Virginia and indicates his opinion that under the doctrine of McCulloch *v.* Maryland[2] Congress has the power to enforce its performance. But in the absence of congressional action has the Supreme Court power to mandamus the legislature of West Virginia to levy a tax to pay its obligation? The argument in the affirmative suggested by the court, is that the grant to the judicial power of jurisdiction to determine controversies between two or more states must have been an effectual grant, and that the power to pronounce judgment must include the power to enforce the judgment. But such reasoning though persuasive is not conclusive. Words have no absolute meaning, but must be interpreted in the Constitution as elsewhere in the light of history and policy. Thus the prohibition of involuntary servitude though absolute in terms, does not prevent compulsory military service.[3] The history of the Fourteenth Amendment is an epic of interpretation from the points of view of both history and the growth of political theory.

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[1] Commonwealth of Virginia *v.* West Virginia, 38 Sup. Ct. 400 (1918).

[2] 4 WHEAT. 316 (1819).

[3] Emma Goldman and Alexander Berkman *v.* United States, 38 Sup. Ct. 166 (1918).

[4] Holmes, J., dissenting, in Lochner *v.* New York, 198 U. S. 45 (1905).

That judicial power should as a general proposition include the power to enforce its judgments is obviously necessary to obtain justice from the imperfection of human nature. But jurisdiction has been taken and judgments rendered in a class of cases where the power to enforce them has existed so entirely in theory alone as to raise doubts that it existed at all. In The Spanish Ambassador *v.* Bingley [5] it was decided that a foreign sovereign might bring a bill in chancery. The Colombian Government *v.* Rothschild [6] held that he must bring it in such a way—by some public officer or otherwise—that justice could be done the defendants in case they chose to bring a cross bill. In Hullett *v.* King of Spain [7] the Spanish Government had deposited money in London which it had received from France to hold in trust for Spanish subjects having claims against the French government under a treaty. The money was also on deposit as security for performance by Spain of its obligations. The court interpreted the various treaties and decreed payment to the King of Spain. If we may suppose for a moment the intervention of the *cestuis que trust* and the French government and the necessity of a decree ordering the disposition of the fund according to a view of the treaty which neither France nor Spain could accept, the difficulties of enforcement in anything more than a highly technical sense are clearly discerned.[8] The fact is that the courts go, and must go, in these cases on the theory which one of our own judges has expressed that they cannot presume that a sovereign state will knowingly disobey the judgment of the court and do injustice.[9] And though at first blush this appears the thinnest fiction, it would seem to be on a sound basis. For the function of the courts is to determine the rights of the parties; and though in the common run the coercive power is merely an adjunct to judicial administration, a vast increase in the degree may make a difference in kind and change a question of judicial administration to one of political expediency. It may well become one of those questions, which, in the language of the Duke of York's Case, is "too high" for the court.[10] Such under our own Constitution is the question of the existence of a state government.[11] And it may be argued that the decision whether any state government is or is not republican in form is of the same nature and must be made by Congress and not by the court.[12] So also,

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[5] HOB. 113.
[6] 1 Sim. 94.
[7] 2 Bligh (P. C.) (N. S.) 31.
[8] See also and compare Nabob of the Carnatic *v.* East India Co., 1 Vesey, 371, and Nabob of the Carnatic *v.* East India Co., 2 Ves. Jr. 56.
[9] Massachusetts *v.* Rhode Island, 12 Pet. 657, 750 (1838).
[10] ROTULI PARLIAMENTORUM, 375; WAMBAUGH'S CASES ON CONSTITUTIONAL LAW, 1.
[11] Luther *v.* Borden, 7 How. 1 (1849).
[12] Pacific States Tel. & Tel. Co. *v.* Oregon, 223 U. S. 1 (1911).

it would seem, is this question as to what method to pursue to force one of our partially sovereign units to pay a debt due to another. The decision should be made by the representatives of the entire people and then enforced by all the processes which the court has at its command.

Historically the case for the existence of this power in the court is no better.

The pre-Revolutionary period gives us little help. The jurisdiction of the English courts was extremely narrow, the mass of appeals being decided by the administrative committee of the Privy Council in charge of Plantation Affairs.[13] Furthermore, the theory was fundamentally different, being that of a sovereign administering dependencies. The Articles of Confederation, however, provided that Congress should be the "last resort on appeal" in cases of disputes between the states.[14] The method of settlement included a notification of the parties to appear, and a direction by Congress that they should appoint judges "who shall constitute a court for determining the matter." In case of failure to agree an elaborate system was provided for appointng judges "to hear and finally determine the controversy." The judges were to report their decision to Congress, which entered it among its acts as "security for the parties." In essence the scheme was that in case of controversy Congress should by law create a court to decide the case. The court performed the judicial function. Then Congress enacted the decision to give security to the parties. The enforcement was clearly by legislative process, if enforcement was necessary.

In view of this situation what power of enforcement is implied in the provision that judicial power shall extend to controversies between two or more states?[15] Formerly in such cases the judicial function had been performed by a court which admittedly had no power to enforce. And we have seen that coercion even to secure justice may develop into a purely political matter. In The Cherokee Nation *v.* Georgia,[16] Chief Justice Marshall said, "that part of the bill which respects the 1 nd occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with the proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia and restrain its physical force. The propriety

[13] The King's Bench had *jurisdiction* only in cases of *quo warranto*, and Chancery only in cases between Lords Proprietary as private subjects. See Massachusetts *v.* Rhode Island, 12 Pet. 657, 739 (1838); SNOW, ADMINISTRATION OF DEPENDENCIES, chap. V.

[14] Article IX.

[15] CONSTITUTION OF UNITED STATES, Article III, § 2.

[16] 5 Pet. 20 (1831).

of such an interposition by the court may well be questioned. It savours to much of the exercise of political power to be within the province of the Judicial department." As bearing on the general belief of the Constitutional Convention as to the coercive power of the judiciary over the states, it is interesting to note that while that department was early given jurisdiction over cases where foreigners were interested in treaties, yet in all drafts up to the final formulation the executive was required to coerce any state which opposed the execution of a treaty.[17] It is also significant that for some time the convention was inclined to reserve disputes between the states in regard to territory and sovereignty—which of all would have seemed the only ones which might need enforcement—for the Senate.[18] And when the broad grant of jurisdiction to the judicial power was finally made we find a contemporary diarist noting that it extended to all controversies of a legal nature between the states.[19] Granting as we do that all disputes between units of a federation are justiciable we may also insist that the coercion of a unit may well be beyond the limitation implied in the words "of a legal nature." Otherwise it would be difficult to explain why so bitter an opponent of Article III as Luther Martin—who also desired that rebellion under state authority should not be treason[20]—took no exception to this grant of power.

It would not seem unreasonable, then, to believe that neither the framers of the Constitution nor subsequent judicial expounders considered that the court had this enforcing power over the states in the absence of a direction by Congress. It is clear both from the history of the case and the language of the opinion that the court finds weighty considerations of policy against claiming it now. Where both historical authority and long judicial practice can consistently join with sound political policy it is well gratefully to declare the union.—Harvard Law Review.

Trade Unions and the Law.—The trade union is one of the oldest of Anglo-Saxon institutions and has for more than a century been a prolific source of litigation, yet two recent decisions from neighboring jurisdictions, presenting an irreconcilable conflict of view, show how far the legal problems raised by these powerful industrial agencies are from a solution. Any discussion which would contribute toward that solution would tax the limits of a volume. The solution will probably be legisiative rather than judicial.

In arriving at that legislative solution it is necessary to under-

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[17] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. I, 246, 247; Vol. II, 157.
[18] FARRAND, *supra*, Vol. II, 160, 170, 183, 186.
[19] FARRAND, *supra*, Vol. III, 169.
[20] FARRAND, *supra*, Vol. II, 223.

stand rightly the aims and view point of modern trade unionism, and these cannot be studied from a more authentic source than the reported decisions which deal with its activities. A great judge once said: "A labor organization in itself teaches respect for law and order. The conscious obedience to the rules and regulations of the organization inculcates a spirit of obedience to all law. Orderly collective action can be attained through organization only. In its absence we have the ungoverned and ungovernable mob. A labor organization improves the mental, moral, material, and physical condition of its members. It teaches them how best to perform their duties, and to become expert in their several callings." Caldwell, J., dissenting, in Hopkins *v.* Oxley Stave Co., 83 Fed. 912.

But it is much to be feared that the judge was speaking of an ideal rather than a real union. A more practical view was taken by Judge Jenkins in Farmers Loan, etc., Co. *v.* Northern Pac. R. Co., 60 Fed. 801, wherein he said: "Of the ideal strike, in the definition proposed at the argument, the only criticism to be indulged is that it is ideal, and never existed in fact. * * * It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is an impeachment of intelligence. From first to last, from the earliest recorded strike to that in the state of West Virginia, which proceeded simultaneously with the argument of this motion, to that at Connellsville, Pa., occurring as I write, force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can come only through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted." The case in which Judge Caldwell wrote is an apt illustration, it appearing therein that a coopers' union was endeavoring to start a nation-wide boycott of the product of a cooperage plant because it used certain machines for hooping barrels instead of having the work done more slowly and expensively by hand. Encomium seems to lose its force when applied to an organization which to serve its personal ends would set back industry into the conditions of the past century. Barr *v.* Trades Council, (N. J.) 30 Atl. 881, reveals a boycott bitterly prosecuted against a newspaper to prevent it from using plate matter in making up the paper. Instances could be multiplied from the reports to show that trade union activities are not, as the advocates of those unions claim, always confined to securing to workers proper conditions of labor and a fair share of the value produced by their toil.

Bearing that fact in mind, the prevailing view point of the courts in respect to the legality of those activities seems to be somewhat open to criticism. That prevailing view seems to be that whatever one man may lawfully do any number of men may combine to do

in their common interest. Perhaps the best illustration of this doctrine lies in the view, maintained by the majority of the decisions, that a trade union may adopt a rule that its members shall not work with nonunion men or with materials produced by nonunion labor, may enforce that rule even by expulsion as against dissenting members, and may compel an employer to discharge the obnoxious employee or dispense with the objectionable materials by threats of a strike. See Parkinson *v.* Building Trades Council, 154 Cal. 581; Gray *v.* Building Trades Council, 91 Minn. 171; Bossert *v.* Duhy, 221 N. Y. 342. The reasoning running through these and many similar decisions is that since workmen have the right to quit work at will and to agree so to quit in concert, they may exercise that right in aid of their supposed interest in the union standing of their coemployees or the source of the materials worked with. The right to quit work at will is elementary, but the abuse of the argument was never more clearly answered than in U. S. *v.* Debs, 64 Fed. 724, Judge Woods saying: "Nor by implication does the opinion there delivered lend the remotest sanction to the proposition asserted by one of the counsel for the defendants, that in free America every man has a right to abandon his position, for a good or a bad reason, and that another, for good or bad reason, may advise or persuade him to do so. Manifestly that is not true. If it were, a servant might quit his place, and another might advise him to quit, in order to make way for the entry of thieves or burglars into the employer's house—a suggestion at which simple minds revolt, and for which the acutest can invent neither justification nor apology."

We come then to the crux of the whole matter—what is a legitimate purpose for which laborers may combine to act in concert at the will of the majority. Many of the decisions can be justified only on the theory that any purpose is legitimate which involves no physical violence and tends in any way to strengthen the union or other affiliated unions of different trades. This, it is submitted, is the vital error running through all the cases which legalize secondary boycotts or sustain rules of the sort under discussion. In Drazen *v.* Curby, 172 App. Div. 417, 158 N. Y. S. 507, it appeared that a member of a building union was expelled for the violation among others of the following rule: "Any member who does an unreasonable amount of work, of who acts as a leader for his employer for the purpose of getting all the work possible out of the men working in the same shop or job with him shall be fined," etc. Thereafter, under the doctrine of Bossert *v.* Duhy, 221 N. Y. 342, it would have been lawful to call a strike to prevent union men working with him. If perchance his proclivity to do more than "a reasonable amount" of work got him a job in some other business it would have been lawful to call a thousand men out of industry to prevent them from

being polluted by materials made by him. In Rhodes Bros. Co. *v.* Musicians Union, 37 R. I. 281, a rule forbidding the members of a union to accept employment from a person who had previously taken a contract with the union was held to be valid. In that case it appeared that the proprietor of a public amusement resort engaged an orchestra for the season from a representative of the union. The music rendered was so unsatisfactory as to cause general complaint among patrons of the resort. The proprietor therefore discharged the orchestra and sought to engage other members of the union who refused to accept the employment because of the rule in question. The proprietor thereupon sued the union to enjoin the enforcement of the rule. It was held that he was not entitled to relief. In Scott-Stafford Opera House Co. *v.* Minneapolis Musicians Union, 118 Minn. 410, the union made a rule that no member should play unless a specified number were employed. The opera house company could not use profitably an orchestra of the prescribed size, but desired to hire enough members of the union to meet its actual needs. Being unable to do so because acceptance of employment would entail expulsion, it brought suit to enjoin the enforcement of the rule, but the court held it to be valid, on the theory that any right "which one man may exercise singly any number may agree to exercise jointly." An opposite conclusion was however reached on identical facts in Haverhill Strand Theater *v.* Gillen, 229 Mass. 413.

The few cases illustratively cited evince clearly the economic tyranny which may possibly be exercised under the prevailing legal theory. That theory was neatly reduced to an absurdity by the Massachusetts court in Haverhill Strand Theater *v.* Gillen, supra, Judge Loring saying: "The consequences of holding a combination for such a purpose to be a legal one are far reaching. If it is legal for a union of musicians to combine for the purpose of forcing a plaintiff (who wants an organist only) to employ an orchestra of several pieces; that is to say, if that indirect purpose of enabling the union musicians to earn more money justifies the adoption of the minimum rule, it is hard to see why it is not legal for a union of carpenters (for example) to refuse to work on a building belonging to the plaintiff unless he uses in the construction of it hand-made doors, window frames and window sashes, in place of doors, window frames and window sashes made by machine. * * * There is more money for masons, carpenters and plumbers building a ten-story store than there is in building a store of two stories. If it is legal for musicians to adopt a minimum rule fixing the number of musicians who shall be employed in all the theaters within its jurisdiction, it is hard to see why a minimum rule may not be adopted by the allied trade unions of masons, carpenters and plumbers fixing the number of stories of which every store to be erected in the

business district is to consist. That is to say, masons, carpenters and plumbers may combine to refuse to work on any store less than ten stories in height even though the owner of the land wishes to erect a store of two stories only and even though the owner in his judgment cannot without pecuniary loss erect one having more than two stories."

If this concession to "solidarity of interest" is made to the unions it must be made to capitalists, and there is no trust or monopoly which cannot be justified thereby. This was pointed out in Irving *v.* Neal, 209 Fed. 471, the court saying: "It is said that workmen have a right to refuse to work for any reason they choose, good or bad, which is satisfactory to themselves. This is true, but it does not follow that they have a right to combine to do so some 200,000 strong over the whole country. Doubtless the purpose of the combination is to advance their own interests without actual malice against manufacturers who do not wish to operate their mills in accordance with the requirements of the unions. This, however, is true of almost every combination in restraint of trade. The combination in this case results all the same in directly restraining competition between manufacturers."

The "solidarity of interest" theory is a theory of industrial warfare. Carried to its logical conclusion it excludes no method of furthering a trade dispute except physical violence. It works therefore inevitably to the disadvantage of the laboring class, since experience has shown that violence and intimidation are more essential to the success of a strike or a boycott than to that of a lockout or a blacklist. The employers, being fewer in number, can secure combined action with less risk of defection from their ranks. A mere cessation of operations means to the employer only a loss of profits while for the employee the time of actual want speedily approaches. Many labor leaders fully recognize the fact that the fair, logical and unfettered application of the "solidarity of interest" theory means a fight in which the laborers will in the long run lose, and wherein victory must be purchased at high cost. Therefore they seek legislation leaving to the unions the advantages of that doctrine but denying to employers the correlative advantages. Solidarity of interest, it is claimed, warrants a concerted refusal to work in any shop with a nonunion man. But statutes have been procured in a number of states forbidding employers to require of employees that they shall not be members of a union. See Coppage *v.* Kansas, 236 U. S. at p. 27. The boycott is held by the laborites to be nothing more than an exercise by individuals of their inalienable right to deal with whom they please and refrain at their pleasure from dealing with any particular persons. But is a blacklist the exercise of an inalienable right to employ only such persons as the employer chooses and refuses to deal with others? Apparently not,

for anti-blacklisting laws have been enacted in a number of states by the pressure of labor influence. A combination of laborers to quit work unless an increased wage is paid is declared to be a noble assertion of the just rights of labor, but a combination of capitalists not to sell except for an increased price seems to be so objectionable as to call for federal regulation.

No abiding solution of the vexed questions arising between capital and labor can be reached on any basis which is unfair, one sided or illogical. Of course justice must be rendered to the laborer, but equally of course justice is due to the capitalist, and, what is too often forgotten, to the great body of the public who are the "innocent bystanders" in labor disputes. So far as questions arising out of the relation of employer and employee can be settled by private negotiation without injury to the public interest, it is consistent with the spirit of our civilization that they should be so settled. But in economic war as in national war, the inevitable result is first to involve the allies of the disputants and then to tread on the toes of the neutrals. Austria and Serbia had a difference, and out of it grew the world war. Just so Brown and the ten carpenters in his shop have a dispute. Shortly the fifty employees in Smith's lumber yard are all out because Smith sells lumber to Brown, and next week a hundred bricklayers on Jones' contract throw down their tools because Brown furnished the window frames, and in a little while the entire population of a city is put to inconvenience in some way or another because Brown's ten carpenters want five cents an hour more than he is willing to pay. As a logical first step therefore it should be made unlawful to combine to carry any labor dispute outside of the employer and employees dirrectly interested in that dispute. If it is found that this produces such a disparity of forces that one or the other of the disputants is unable to secure justice a remedy must be sought in public law and not in private warfare.—Law Notes.

Punishment by Fine.—In the day when the cares of state consisted chiefly in devising new methods of compelling the subject to contribute to the royal revenues, the punishment of crime by fine was deemed a very happy invention. No nice theories of reformation or determent marred the regal satisfaction with the device; it was sufficient that it got the money. By sheer force of tradition this device of impecunious kings has survived to an age in which the raising of revenue is a secondary interest of government. Viewed as a measure of reformation punishment by fine is of course an absurdity.

As a deterrent, it is deprived of most of its value by its inevitable

inequality. To the proprietor of a family flivver, the possibility of a twenty dollar fine is an adequate deterrent against speeding. To the class of drivers by whom most of the speeding is done it is no deterrent at all.

As applied to violations against regulations of business, the fining system, unless the fine is so large as to exceed by far the possible profits of the illegality, becomes in effect a license to commit crime. Take for example the fines imposed on dealers who disobeyed the government price regulations.

If there ever was a crime which deserves capital punishment it is profiteering in the necessities of life during war time. It embodies all the moral elements of treason and springs from a motive more sordid than that which ordinarily animates the traitor. The murderer may kill from passion, the anarchist may plead a real though misguided sympathy with the sufferings of the poor, but the profiteering merchant weakens the resources and the morale of the country for his own financial gain. To a lesser degree, the merchant who in time of peace gives short weight or adulterates a food product is guilty of a crime involving more moral turpitude than most felonies for which men are sent to the penitentiary. Moreover, by a climax of irony, in such cases the fine imposed does not come out of the culprit but out of his victims. Even if it exceeds the past profits of his illegal dealing, which is rarely the case, it merely incites him to more cunning fraud until he can make the ultimate consumer pay the balance. As a general rule, any offense which is adequately punished by a fine does not merit punishment at all. There are some minor offenses of which cognizance must be taken for which a sentence of imprisonment is excessive. In such a case the methods of the juvenile court should be adopted, the offender being released on parole and required to report from time to time until he satisfies the court that there is no likelihood of his repeating the offense. Minor crimes spring from an inadequate sense of social duty and such treatment would do far more to awaken that sense than the imposition of a fine. If it fails and the crime is repeated, imprisonment would then be merited.—Law Notes.